Supreme Court, U.S.
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No. 99-1265 (14)

In The

Supreme Court of the United States

AMERICAN LUNG ASSOCIATION,

Petitioner,

v.

AMERICAN TRUCKING ASSOCIATIONS, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY OF AMERICAN LUNG ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 DISCLOSURE

American Lung Association (ALA) adopts the Rule 29.6 disclosure set forth in ALA's petition for certiorari at ii.

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REPLY OF AMERICAN LUNG ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

None of the responses to American Lung Association's (ALA's) petition casts doubt on the extraordinary public health importance of the national ambient air quality standards (NAAQS) that the lower court has remanded. As the Environmental Protection Agency (EPA) found below, those standards will make a profound difference in pollution levels to which tens of millions of Americans are exposed, thereby avoiding each year many thousands of premature deaths, hospitalizations for respiratory and cardiopulmonary illness, other adverse respiratory effects such as reduced lung function and pain on breathing, as well as missed work days. ALA Pet. 6, 12, 16 (citing EPA). The court below did not challenge these findings, and indeed resoundingly rejected attacks on EPA's decision to set a fine particle standard. App. 50-51.[1] Despite occasional hit-and-run disparagement of EPA's analysis, respondents do not seek certiorari on any aspect of the scientific underpinnings for these standards. Thus, the vital public health implications of these standards counsel strongly in favor of certiorari. Accordingly, we turn to the specific issues addressed by the petitions.

I. THE COURT SHOULD GRANT CERTIORARI TO REVIEW THE NONDELEGATION QUESTION, AND SHOULD REJECT RESPONDENTS' INACCURATE REFORMULATION OF THAT QUESTION.

Respondents American Trucking Associations (ATA) and Appalachian Power concede that the lower court's nondelegation ruling merits review by this Court. ATA

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[1] Citations to "App." refer to the appendix filed by Massachusetts and New Jersey in No. 99-1263.

Rsp. at 1, 10; Appalachian Power Cross-Pet. at 24. *Accord,* Ohio Rsp. at 3 (Ohio does not oppose certiorari on the nondelegation question). However, they wish to reformulate the nondelegation question, and to add an additional question. ALA's response to the cross-petitions demonstrates why the proposed additional question should be rejected. The discussion below shows that respondents' proposed reformulations are meritless also.

An initial reason for rejecting respondents' formulations of the nondelegation question is that those formulations are argumentative. ATA's Question 1 assumes that EPA's interpretation was "standardless," and Appalachian Power's and Ohio's Question 1 asks this Court to remand for EPA "to exercise the discretion delegated to it by Congress to develop intelligible criteria," thus assuming that the statute itself does not specify intelligible criteria and that EPA has not exercised its discretion pursuant to the statutory criteria. These argumentative questions should be rejected in favor of the more neutral questions proposed by ALA, EPA, and Massachusetts. Sup. Ct. R. 14.1(a) (questions "should not be argumentative").

In addition, Appalachian Power's proposed question would improperly seek review of a question that is reviewable only by cross-petition, not by response. *See* ALA Rsp. to Cross-Petitions at Part V.

Finally, respondents' proposed questions ignore the essence of the lower court's nondelegation ruling. First, though that ruling was clearly based on an alleged *constitutional* violation, App. 12 (finding that the Act's language and EPA's interpretation "involve an *unconstitutional* delegation of power") (emphasis added), the Constitution is mentioned nowhere in respondents' proposed questions. Second, though the lower court plainly asserted that *Clean Air Act § 109 itself* does not set forth

an intelligible principle, App. 4 ("nor is [an intelligible principle] . . . apparent from the statute"), respondents' proposed reformulations omit any reference to whether that ruling was correct, instead focusing only on *EPA's interpretation* of the statute.

Respondents' attempt to avoid review of the lower court's constitutional ruling concerning § 109 is understandable, given that none of them defends that ruling. Indeed, quite the contrary: ATA concedes that § 109 "undisputedly is *not*" unconstitutional. ATA Rsp. at 15 (emphasis added). *Accord*, Natl. Stone Assn. Rsp. at 8 (conceding that an " 'intelligible principle' [was] provided by Congress"). If the Act is undisputedly constitutional, however, there was no basis for the lower court to proceed to a constitutionally based evaluation of EPA's interpretation, much less to require a constitutionally based narrowing of that interpretation. *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (recent application of nondelegation doctrine has been principally limited "to giving narrow constructions to statutory delegations *that might otherwise be thought to be unconstitutional*") (emphasis added). Thus, it is particularly important that the nondelegation question be formulated to reflect the lower court's ruling concerning the constitutionality of the Act. Review of that ruling should be dispositive of the lower court's entire nondelegation ruling – *i.e.*, the portion addressing the Act as well as the portion addressing EPA's interpretation of the Act.

Even assuming arguendo that the lower court properly proceeded to evaluate EPA's interpretation, respondents' reformulated questions should still be rejected, because once again they overlook the *constitutional* aspect of the lower court's ruling. App. 12 (finding that EPA's interpretation "involve[s] an *unconstitutional* delegation

of power") (emphasis added). The core of that constitutional ruling was the lower court's demand that EPA prescribe a "*determinate criterion* for drawing lines." App. 5 (emphasis added). This Court, however, has plainly ruled that there is "[n]o[ ] . . . constitutional requirement that the legislative standards be translated by [an agency] . . . into formal and detailed rules of thumb prior to their application to a particular case," and that there is no constitutional obstacle to an agency using "the more flexible case-by-case method." *American Power & Light Co. v. SEC*, 329 U.S. 90, 106 (1946). Moreover, because this Court's precedent establishes that the nondelegation doctrine does not require a determinate criterion even for statutes, ALA Pet. 18-21, the doctrine cannot possibly require such a criterion for agency *interpretations* of statutes. In short, because the constitutional aspect of the lower court's ruling concerning EPA's interpretation should be dispositive, respondents' proposal to define the Constitution out of the nondelegation question should be rejected.

Respondents' attempted justifications of their reformulations must be rejected. First, respondents argue that in the wake of *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the nondelegation doctrine has changed; instead of the courts offering narrowing constructions, they should remand for the agency to do so. ATA Cross-Pet. at 5 (quoting App. 69-70), 8, 11. *See also* Appalachian Power Rsp. at 13, 15. ALA submits that this assertion – which is unsupported by any decision of this Court – is plainly wrong on the merits: the nondelegation doctrine requires Congress, not the agency, to supply an intelligible principle. For present purposes, however, it suffices to observe that respondents' argument is a *constitutional* one – *i.e.*, it is an argument about

the application of the constitutionally based nondelegation doctrine. Thus, respondents' argument undermines rather than supports respondents' attempt to omit the Constitution from the nondelegation question presented to this Court.

Second, respondents attempt to equate the lower court's nondelegation ruling with a garden variety non-constitutional remand under *Chevron* or the arbitrary and capricious standard. Appalachian Power Rsp. at 12-13; ATA Rsp. at 14. This argument is refuted by the lower court itself, which stated:

> EPA cites prior decisions of this Court holding that when there is uncertainty about the health effects of concentrations of a particular pollutant within a particular range, EPA may use its discretion to make the "policy judgment" to set the standards at one point within the relevant range rather than another. *NRDC v. EPA*, 284 U.S. App. D.C. 136, 902 F.2d 962, 969 (D.C. Cir. 1990); *American Petroleum Inst. v. Costle*, 214 U.S. App. D.C. 358, 665 F.2d 1176, 1185 (D.C. Cir. 1981); *Lead Industries*, 647 F.2d at 1161 (D.C. Cir. 1980). We agree. But *none of those panels addressed the claim of undue delegation that we face here*, and accordingly had no occasion to ask EPA for coherence (for a "principle," to use the classic term) in making its "policy judgment."

App. 11 (emphasis added). Thus, the lower court clearly believed that its invocation of the constitutionally based nondelegation doctrine made possible a ruling that the court would not have been able to issue on non-constitutional grounds. It is precisely the lower court's *constitutionalization* of what should have been a non-constitutional administrative law question that merits this Court's review.

II. THE COURT SHOULD GRANT CERTIORARI TO PREVENT EPA'S UNDISPUTED AUTHORITY TO REVISE NAAQS FROM BEING REDUCED TO A POINTLESS EXERCISE.

Respondents' position on the Subpart 2 question strongly underscores the need for certiorari concerning EPA's authority to implement and enforce a revised ozone NAAQS. Unlike Judge Tatel, who at least concluded that a new ozone NAAQS can be implemented and enforced in areas that are attaining the pre-existing one-hour NAAQS, App. 81, respondents adopt a maximalist reading of the lower court's opinion, asserting that the new eight-hour NAAQS can *never* be implemented or enforced in *any* area. Appalachian Power Rsp. at 28; Ohio Rsp. at 2.

This reading reduces the statute to an absurdity. The lower court held – in a ruling *not* challenged by respondents in this Court – that the 1990 Amendments retained EPA's duty to revise NAAQS as appropriate, and to designate nonattainment areas pursuant to such revisions. App. 31-34. Acting pursuant to this duty, EPA carefully considered the scientific evidence, concluded that adverse health effects are occurring at ozone levels allowed by the pre-existing one-hour NAAQS, and promulgated a new NAAQS to address those effects. Yet under the lower court's ruling (as interpreted by respondents), EPA is now statutorily barred from ever implementing or enforcing this new standard anywhere, and the children and asthmatics suffering pain and reduced lung function due to ozone levels allowed by the prior NAAQS are simply abandoned to their fate. Thus, contrary to respondents' attempt to portray their position as a defense of Subpart 2 against Subpart 1, their real argument is that the new standard cannot be implemented or enforced under *either* subpart. This argument reduces the

Act to an absurdity, and flies in the face of the Act's core public health purpose.

Nor are respondents persuasive even in their chosen domain of statutory textualism. Their whole textual argument (and the lower court's holding) rests on the assertion that, because of § 181(a)(1)'s cross-reference to the entirety of § 107(d), § 181(a)(1) is not limited to the one-hour standard, but instead specifies classifications and attainment dates for *any* ozone standard – including the new eight-hour standard. This professed fidelity to statutory text is illusory, however. Tellingly, neither respondents nor the lower court was able to point to a single classification or attainment date specified by § 181(a)(1) for the eight-hour standard – or even to respond to, much less refute, ALA's arguments on this point, ALA Pet. at 25. The reason is simple: § 181(a)(1) specifies no such classifications or attainment dates.

First, for areas with a design value less than 0.121, § 181(a)(1) specifies no classifications or attainment dates: the table set forth in that provision provides classifications and attainment dates only for areas with design values of 0.121 or higher. As Judge Tatel observed, "it is difficult to see how Subpart 2 can 'specifically provide[ ]' attainment dates for areas that are designated nonattainment under the new standard but are not covered by Table 1." App. 77.

Indeed, a recent D.C. Circuit decision – written by Judge Williams, a member of the panel below – held that § 181(a)(1) does not set forth classifications or attainment dates even for all nonattainment areas under the pre-existing one-hour standard. *American Petroleum Institute v. USEPA*, 198 F.3d 275, 278-80 (D.C. Cir. 2000) (holding that "sub-marginal" areas – *i.e.*, areas that are in nonattainment with the one-hour standard but have design values less than 0.121 – are not covered by Table 1 of § 181(a)(1);

Table 1 and nonattainment status "overlap but are distinct"). The *API* decision confirms an observation made in the lower court opinion itself. App. 33 ("not all areas designated nonattainment for ozone will have design values of 0.121 ppm or higher"). These statements undermine the lower court's conclusion that "Subpart 2 specifically provides classifications and dates for *all* areas designated nonattainment under *any* ozone NAAQS." App. 34-35 (emphasis added).

A second reason why respondents' (and the lower court's) textual argument fails is that neither respondents nor the lower court was willing to acknowledge – much less accept – the implications of that argument. For nonattainment areas under the new NAAQS whose design values are between 0.121 and 0.160, that argument would lead to the conclusion that those areas have attainment dates that *had already passed* as of the date when the 1997 ozone standard was promulgated. § 181(a)(1) (setting forth a 1993 deadline for areas with design value from 0.121 to 0.138, and a 1996 deadline for areas with design value from 0.138 to 0.160). Respondents' (and the lower court's) unwillingness to follow their textual argument to its absurd conclusion – or even to respond to ALA's discussion of this point – undermines the alleged textual basis for the lower court's ruling.

In addition to its incorrect rulings concerning classifications and attainment dates, the lower court also incorrectly held (App. 31) that the "control measures" of Subpart 2 oust those of Subpart 1 for purposes of the new eight-hour NAAQS. Respondents do not point to any statutory provision that ousts the Subpart 1 control measure requirements. *See* ALA Pet. 26 (noting that the lower court had not pointed to any such provision, and that no such provision exists). Instead, respondents argue that

" 'ouster' language is not needed in these later subsections of § 172 once areas are 'ousted' from the deadline and classification provisions that trigger the planning requirements." Appalachian Power Rsp. at 26 n.49. To the contrary, the statute plainly provides that the control measure requirements are triggered by "the designation of an area as nonattainment with respect to a national ambient air quality standard under section 107(d)." § 172(b). In a holding not challenged by respondents, the lower court ruled that the § 107(d) designation provision does apply to the new NAAQS. App. 33-34 (EPA is required to designate nonattainment areas under the new NAAQS). Accordingly, absent an ouster provision, the control measures triggered by this designation apply as well.

Unable to defend the lower court's Subpart 2 holding, respondents argue that the holding is not appropriate for certiorari. In doing so, they mischaracterize the Subpart 2 question as simply alleging "the misapplication of a properly stated rule of law." ATA Rsp. at 19 (quoting Sup. Ct. R. 10). To the contrary, the Subpart 2 question is itself a question of law – *i.e.*, of the proper interpretation of the Clean Air Act. This Court's rules plainly contemplate review of "important question[s] of federal law," Sup. Ct. R. 10(c), and respondents cannot seriously deny the importance of the question whether EPA has authority to implement and enforce nationwide air quality standards affecting the exposure of millions of Americans to harmful air pollution.

Finally, respondents argue that the Subpart 2 ruling is interlocutory, because EPA must pursue a remand to address the alleged beneficial health effects of ozone. Appalachian Power Rsp. at 29-30; ATA Rsp. at 16-18. That remand would be a pointless exercise, however, if EPA

were barred from implementing or enforcing any resulting ozone standard. Moreover, there is no basis for respondents' suggestion (ATA Rsp. at 20) that the Subpart 2 question should be presented to the D.C. Circuit yet again before this Court accepts review. While the lower court indicated that "[t]he *remaining* issues" – *i.e.*, those not yet expressly ruled on – could not be resolved pending completion of the remand, App. 4 (emphasis added), the court nowhere invited post-remand reargument of the Subpart 2 question. That question, having already been considered by the lower court twice (on the merits and on rehearing), is clearly ripe for this Court's review.

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Respectfully submitted,

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